

trustmediation

~ not-for-profit dispute resolution ~

Tel: 0207 353 3237 Fax: 0207 583 9521

www.trustmediation.org.uk info@trustmediation.org.uk



Trust Mediation Limited
218 Strand
London
WC2R 1AT

Mediation: Personal injury

Trying the alternative

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The use of alternative dispute resolution can be central to reducing costs for all stakeholders and improving control over personal injury settlements. Rather than a sign of weakness, Tim Wallis and Tony Newman explain how early mediation can offer a fair and balanced conclusion

Repeat users of mediation in the insurance industry find it a flexible tool, which, when properly deployed, has the potential to reduce costs while also treating customers and claimants fairly.

But questions about this form of alternative dispute resolution continue to be asked, particularly in the personal injury arena. Perhaps by outlining the evidence of progress in its use by some insurers, and highlighting recent comments by the judiciary, these can be answered.

Since 1999 the overriding objective has obliged judges to encourage the use of ADR. The personal injury pre-action protocol has now been strengthened and refers specifically to mediation - parties may be required to provide evidence that alternative means of resolving their dispute were considered and the absence of this is something the court must have regard to when determining costs.

Senior members of the judiciary also frequently press home the message. On 25 October, Sir Anthony Clarke, master of the rolls, commended the following passage to a Law Society conference, citing Lord Justice Ward in the case of *Egan v Motor Services (Bath)*: "In so many cases, the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of common sense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often."

Resisting resolution

Furthermore, district judges, as well as their senior counterparts, are now making costs orders against parties who resist making proper attempts at dispute resolution.

One of the questions most frequently asked is which cases are suitable for mediation and when is the right time to pursue it. But perhaps the more appropriate question is which cases are 'unsuitable' for mediation? These are arguably confined to cases where other forms of ADR, such as traditional negotiation and round table settlement meetings, will achieve settlement effectively; cases involving allegations of fraud; and those where points of law are involved that require judicial resolution.

As for the right time to mediate, this is simply when parties have sufficient information to make a business decision about settlement. A trial bundle is no more necessary for mediation than it is for settling a claim by phone. Experience in using mediation is the only prerequisite for making the right judgement calls on these matters.

Another complaint often heard is from parties who argue that they would mediate, but the other side refuses. Do not take no for an answer - there is no need to. A simple

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Chairman Sir Henry Brooke

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written offer to mediate, referring to the pre-action protocols and the rules, will put the other side at significant risk of a costs sanction. Once proceedings are commenced, the same letter can be used to support an application to stay the case for mediation. These tactics, seldom used at present, can reduce the life-cycle of claims.

Most claims settle by routine negotiation, some will be tried or discontinued and the rest will be negotiated face to face, in round table meetings or at mediation. There is no 'right' way. The skilled negotiator assesses all of the available information, formulates a negotiation strategy and implements it. Experienced users of mediation know that in some cases mediation can offer a lot more than a joint settlement meeting. Put it this way, if mediation had little to offer over and above routine negotiation it simply would not have the worldwide reputation it undoubtedly does. The benefits are clear and supported by the experience of insurers who have been proactive in its use. Therefore, the question for the discerning claims manager is - can a negotiator who is unskilled in mediation successfully assess all of the options to achieve an optimum outcome?

By way of an example, Allianz launched its approach to personal injury mediation in 2004. As a rule of thumb, the insurer offers mediation if a stalemate situation is reached or earlier if experience indicates it would be the most effective route to settlement. In addition, panel lawyers are required to consider and comment on mediation on every instruction they receive.

To date, between 80% and 93% (dependant of the point of analysis) of the cases that have been mediated settled either at the mediation or shortly afterwards. Given the nature of the cases selected, this certainly justifies Lord Justice Ward's "astonishingly good" label.

Every case that settles due to mediation results in a reduced cycle time and benefits all stakeholders. For example, claimants receive justice earlier, have direct control over the settlement and, being in receipt of the damages, they can move on with their lives and avoid the trauma and risk of trial. Insurers also retain control over the settlement and avoid the significant cost of progressing a case to trial. Furthermore, better policy experience can result in lower premiums for policyholders and legal expenses insurance providers have reduced exposure.

Rejecting the olive branch

And yet, despite the levels of success, the benefits, the pre-action protocol and the support of the courts, a regrettably high proportion of the hundreds of mediations offered by Allianz continue to be rejected by claimant solicitors - 66% of those on litigated cases, and 90% on pre-litigated cases.

But it is not fair to single out claimants for failing to participate in mediation. While some insurers have realised the merit of mediation, others have been - and continue to be - uninterested or unconvinced. Most injury practitioners lack any experience of mediation and therein lies the problem. Acceptance comes with knowledge and experience. And the solution lies in being prepared to try something new.

So will the drive toward further mediation be commercially driven or come from court incentives and sanctions?

Judicial pronouncements are influential and they buttress the strengthening of the pre-action protocols. Such legal developments are now reflected in the marketplace.

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Allianz for one intends to continue its drive to channel selected cases in this direction and is running a telephone mediation pilot with the Centre for Effective Dispute Resolution. Similarly, Axa is one of a number of insurers that has instituted a training programme to deliver a mediation capability. In addition, Inter Resolve is operating its bodily injury claims scheme and is also experimenting with telephone mediation. And former Court of Appeal judge Sir Henry Brooke, now a professional mediator, is chairman of a new not-for-profit company, Trust Mediation, which focuses solely on mediation in the personal injury market.

Incentives and sanctions are important drivers but commercial factors are likely to be more powerful.

Tim Wallis is a mediator and solicitor; a director of Trust Mediation; a director of Expedite Resolution and chair of the Civil Justice Council's ADR Committee. Tony Newman is claims controller at Allianz Insurance.

INFORMATION LINKS

ADR Group: www.adrgroup.co.uk

Andrew Fraley: www.andrew-fraley.com

Centre for Effective Dispute Resolution: www.cedr.co.uk

The Civil Justice Council: www.civiljusticecouncil.gov.uk

The Civil Mediation Council: www.civilmediation.org

Clerksroom: www.clerksroom.com

Chartered Institute of Arbitrators: www.drs-ciarb.com

Expedite Resolution: www.expediteresolution.com

In Place of Strife: www.mediate.co.uk

Inter Resolve: www.intermediation.com

National Mediation Helpline: www.nationalmediationhelpline.com

Online Mediation: www.themediationroom.com

The Negotiator Magazine: www.negotiatormagazine.com

Trust Mediation: www.trustmediation.org.uk

The Law Society and its Dispute Resolution Section: www.lawsociety.org.uk

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